

93D CONGRESS } SENATE } REPORT
1st Session No. 93-588

AMENDING REORGANIZATION PLAN NO. 2 OF 1973, AND PROVIDING A
REMEDY AGAINST THE UNITED STATES FOR INTENTIONAL TORTS
OF ITS INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS

NOVEMBER 29, 1973.—Ordered to be printed

Mr. ERVIN, from the Committee on Government Operations,
submitted the following

REPORT

[To accompany H.R. 8245]

The Committee on Government Operations, to which was referred the bill (H.R. 8245) to amend Reorganization Plan No. 2 of 1973, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of H.R. 8245, as amended, is (1) to repeal those sections of Reorganization Plan No. 2 of 1973 which transferred to the Secretary of the Treasury certain functions vested by law in the Attorney General, of the Department of Justice regarding the inspection of persons and documents at U.S. ports of entry; and (2) to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers.

BACKGROUND

Section 1. Reorganization Plan No. 2 of 1973 established in the Department of Justice a new agency, the Drug Enforcement Administration, and transferred to the Secretary of the Treasury functions vested by law in the Attorney General, or the Department of Justice, regarding the inspection of persons and documents at U.S. ports of entry. This function involves approximately 900 immigration inspectors who, under the provisions of the Reorganization Plan, were transferred from the Immigration and Naturalization Service of the Department of Justice to the Customs Bureau of the Department of the Treasury.

During the course of Committee consideration of Plan No. 2 of 1973, it became apparent that there was wide-scale opposition to the proposed transfers by the immigration inspectors involved, by the American Federation of Government Employees and by Members of Congress. Following discussions between administration and union representatives, certain understandings were reached whereby the administration agreed not to implement the transfer provided for in the Plan. A memorandum embodying the terms of the agreement was placed in the files of the Committee, and the American Federation of Government Employees agreed to withdraw its opposition to the Plan.

During floor debate in the House of Representatives on H. Res. 382, to disapprove Reorganization Plan No. 2, Congressman Hollings, Chairman of the House Committee on Government Operations, explained the situation and gave assurances that prompt action would be taken to consider and report a bill repealing the objectionable portions of Reorganization Plan No. 2. The resolution of disapproval was defeated and the Plan became effective on July 1, 1973.

H.R. 8245, which passed the House of Representatives on July 17, 1973, would repeal section 2 and subsection 6(b) and modify section 8 of Reorganization Plan No. 2 of 1973, thus nullifying the transfers of the immigration inspectors provided for in the Plan.

Section 2. This section represents a Committee amendment to the bill as it passed the House. This amendment proposed by the chairman, and Senators Percy and Davids grows out of hearings held by the Committee on the Reorganization Plan last spring. During the course of these hearings several incidents were brought to the Committee's attention in which Federal narcotics agents engaged in abusive, illegal and unconstitutional "no-knock" raids. The Committee's amendment is designed to prevent future abuses of the Federal "no-knock" statute (21 U.S.C. 879).

The most notorious of these raids occurred on April 29 of this year in Collinsville, Illinois. In separate incidents involving the same Justice Department agents, "no-knock" raids were conducted into two different homes in Collinsville. The agents entered the two houses without warrants in violation of the Federal "no-knock" statute, kicked in the doors without warning, shouting obscenities, and threatening the occupants with drawn weapons. The terrified inhabitants were only temporarily relieved when the agents left after discovering that they had entered the wrong houses.

There is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected. Since they were not then suspects, nor are they now Federal defendants, they cannot move in a prosecution to suppress evidence, the traditional remedy for violation of Fourth Amendment rights. Indeed there was not any evidence seized in these raids because, of course, the agents were at the wrong addresses. Furthermore, neither family can recover from the Federal Government in a civil action because of the doctrine of sovereign immunity.

As a general principle under present law, if a Federal agent violates someone's constitutional rights—for instance, Fourth Amendment

rights against illegal search and seizure—there is no remedy against the Federal Government. This ancient doctrine—sovereign immunity—stands as a bar.

Only recently was there even a right of action against the offending officers themselves. In the case of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court held that the Fourth Amendment and elementary justice require that there be a right of action against the Federal agents for illegal searches conducted in bad faith or without probable cause. Of course, Federal agents are usually judgment proof so this is a rather hollow remedy.

For years scholars and commentators have contended that the Federal Government should be liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification. However, the Federal Torts Claims Act (28 U.S.C. 2671-2680) the embodiment of sovereign immunity in the United States Code, protects the Federal Government from liability where its agents commit intentional torts such as assault and battery. The injustice of this provision should be manifest—for under the Federal Torts Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal “no-knock” raid.

COMMITTEE ACTION

The Committee amendment to the bill, contained in a new section 2 thereof, would add a proviso at the end of the intentional torts exception to the Federal Tort Claims Act (28 U.S.C. 2680(h)). The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Thus, after the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

The Committee realizes that under the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage. Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Torts Claims Act, if the amendment is adopted.

This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement

abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

The administration is aware of this amendment to H.R. 8245, which is the product of over 2 months of discussion between the staff of the Committee, the Office of Management and Budget and the Department of Justice. The Committee has been informed that the administration, and, in particular, the Department of Justice, has no objection to the amendment. Therefore the Committee urges speedy adoption of this measure as a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses.

Costs

Since it is not possible to forecast the number of civil damage suits which may be brought against the United States under the provisions of this bill, or the amount damages assessed against the United States, if any, it is not possible to estimate the costs which may result.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman) :

REORGANIZATION PLAN NO. 2 OF 1973

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 28, 1973, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

LAW ENFORCEMENT IN ILLICIT DRUG ACTIVITIES

Section 1. Transfers to the Attorney General. There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana, except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: *Provided*, That any illicit narcotics, dangerous drugs,

marijuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General; *Provided further*, That nothing in this section shall be construed as limiting in any way any authority vested by law in the Secretary of the Treasury, the Department of the Treasury, or any other officer or any agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs, and marijuana; and *Provided further*, That nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marijuana, at ports of entry or along the land and water borders of the United States.

Sec. 2. Transfers to the Secretary of the Treasury. There are hereby transferred to the Secretary of the Treasury all functions vested by law in the Attorney General, the Department of Justice, or any other officer or any agency of that Department, with respect to the inspection at regular inspection locations at ports of entry of persons, and documents of persons, entering or leaving the United States: *Provided*, That any person apprehended or detained by the Secretary or his designee pursuant to this section shall be turned over forthwith to the jurisdiction of the Attorney General: and, *Provided further*, That nothing in this section shall be construed as limiting, in any way, any other authority that the Attorney General may have with respect to the enforcement, at ports of entry or elsewhere, of laws relating to persons entering or leaving the United States. ▀

Sec. 3. Abolition. The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No. 1 of 1968 is hereby repealed. The Attorney General shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics and Dangerous Drugs not otherwise provided for in the Reorganization Plan.

Sec. 4. Drug Enforcement Administration. There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration, hereinafter referred to as "the Administration."

Sec. 5. Officers of the Administration. (a) There shall be at the head of the Administration the Administrator of Drug Enforcement, hereinafter referred to as "the Administrator." The Administrator shall be appointed by the President by and with the advice and consent of the Senate, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). He shall perform such functions as the Attorney General shall from time to time direct.

(b) There shall be in the Administration a Deputy Administrator of the Drug Enforcement Administration, hereinafter referred to as "the Deputy Administrator," who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such

functions as the Attorney General may from time to time direct, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level V of the Executive Schedule Pay Rates (5 U.S.C. 5316).

(c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

Sec. 6. Performance of transferred functions. (a) The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of Justice.

(b) The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of the Treasury.

Sec. 7. Coordination. The Attorney General, acting through the Administrator and such other officials of the Department of Justice as he may designate, shall provide for the coordination of all drug law enforcement functions vested in the Attorney General so as to assure maximum cooperation between and among the Administration, the Federal Bureau of Investigation, and other units of the Department involved in the performance of these and related functions.

Sec. 8. Incidental transfers. (a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available or to be made available in connection with the functions transferred to the Attorney General [and to the Secretary of the Treasury] by this Reorganization Plan as the Director of the Office of Management and Budget shall determine shall be transferred to the Department of Justice [and to the Department of the Treasury, respectively,] at such time or times as the Director shall direct.

(b) Such further measures and dispositions as the Director of the Office of Management and Budget shall deem to be necessary in order to effectuate transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by such Federal agencies as he shall designate.

Sec. 9. Interim Officers. (a) The President may authorize any person who, immediately prior to the effective date of this Reorganization Plan, held a position in the Executive Branch of the Government to act as Administrator until the office of Administrator is for the first time filled pursuant to the provisions of this Reorganization Plan or by recess appointment as the case may be.

(b) The President may similarly authorize any such person to act as Deputy Administrator.

(c) The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office in respect to which he so serves. Such compensation, if authorized, shall be in lieu of, but not in addi-

tion to, other compensation from the United States to which such person may be entitled.

SEC. 10. *Effective date.* The provisions of this Reorganization Plan shall take effect as provided by section 906(a) of title 5 of the United States Code or on July 1, 1973, whichever is later.

Chapter 171 of Title 28. Tort Claims Procedure

* * * * *

Sec. 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided that, with regard to acts or omissions of investigative or law enforcement officers of the United States government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the enactment of this Proviso out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. For the purpose of this subsection 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.*

○